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Honorable Salvador Mendoza, Jr.

6 **UNITED STATES DISTRICT COURT FOR THE**
7 **EASTERN DISTRICT OF WASHINGTON**
8 **AT SPOKANE**

9 SOUTH HILL MARKET, a Washington
10 entity; GEDION TEKLEMARIAM
11 TESFA, an individual and OGBAI
12 GEBREMICHAEL TESFU, an individual,

13 Plaintiffs,

14 v.

15 UNITED STATES OF AMERICA; and
16 U.S. DEPARTMENT OF
17 AGRICULTURE (USDA),

18 Defendants.

No. 2:19-cv-00073-SMJ

**PLAINTIFFS' MOTION TO STRIKE
REPLY OR FOR LEAVE TO FILE
SURREPLY**

Hearing Date: **07/08/2020, 6:30pm**
WITHOUT ORAL ARGUMENT

19 The Plaintiffs in the above-captioned case, through counsel, respectfully move to strike
20 Defendant's Reply Memorandum or for leave to submit a Surreply in response to new arguments
21 and factual claims made by Defendants in Defendants' Reply Memorandum in Support of
22 Summary Judgment of June 26, 2020. ("Defs.' Reply"). These arguments and claims did not
23 appear in the Defendants' previous brief, and thus Plaintiffs have not had an opportunity to
24 respond.

Plaintiff moves to strike Defendant's reply brief in as much as it raises issues not included
in the motion. Issues and argument raised for the first time in a reply brief are untimely and

1 waived. Ives. V. Ramsden, 142 Wn. App. 369, 397, 174 P.3d 1231 (2008). Similarly, declarations
 2 filed with a Reply brief are untimely. Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F.Supp.
 3 1400 (BNA) 1985 (W.D. Wash. 1990); Wood v. Santa Barbara Chamber of Commerce, Inc., 705
 4 F.2d 1515 (9th Cir 1983). Here, Defendant asserts new arguments in their reply brief, together
 5 with a declaration and exhibits, that must be considered untimely.

6 A surreply, or sur-reply, is an additional reply to a motion filed after the motion has
 7 already been fully briefed. The Local Rules provide for a motion, an opposition, and a reply.
 8 Neither the Local Rules nor the Federal Rules provide the right to file a surreply. A district court
 9 may allow a surreply to be filed, “where a valid reason for such additional briefing exists, such
 10 as where the movant raises new arguments in its reply brief.” Hill v. England, 2005 WL 3031136,
 11 *1 (E.D.Cal. Nov. 8, 2005). “If the court were to deny plaintiffs leave to file the surreply,
 12 plaintiffs would be unable to contest matters presented to the court for the first time in the form
 13 of Davis' declaration.” Alexander v. F.B.I., 186 F.R.D. 71, 74 (D.D.C. 1998).

14 In the present case, Defendant presents a different argument in its reply brief than what it
 15 presented in its motion. Defendant uses and attaches new portions of transcripts to make this
 16 argument. Defendant also submitted declarations and exhibits with the reply brief. Incidentally,
 17 the new Declaration submitted by the Defendant brings into question some pictures that were
 18 submitted by USDA’s contractor, Mr. Webber. However, the declaration is from a different
 19 employee, Ms. Rivas, and not Mr. Webber. Ms. Rivas is attempting to testify to what Mr. Webber
 20 did or did not do during his store visits. Information provided in the Declaration by Ms. Rivas
 21 should be considered hearsay at best and disregarded. Additionally, the new transcript testimony
 22 is being used to argue that Plaintiff had no explanation for the suspicious transactions, which is
 23
 24

1 also not accurate according to the record before this Court. That material should be stricken. In
2 the alternative, Plaintiff should be allowed to brief Defendant's new allegations.

3 Counsel for both parties have conferred on this matter; counsel for the Defendants opposes
4 this motion.

5 DATED this 29th day of June, 2020.

6 **SEATTLE LITIGATION GROUP, PLLC**

7 /s/ Jimmy Garg

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13 *Attorney for Plaintiffs*

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the United States of America and the State of Washington that on the date stated below, I caused the foregoing *MOTION TO STRIKE REPLY OR FOR LEAVE TO FILE SURREPLY, DECLARATION OF JIMMY GARG IN SUPPORT OF MOTION, and PROPOSED ORDER* to be served on the following parties:

William D. Hyslop, US Attorney
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Attorney for Defendants

- | | |
|-------------------------------------|--------------------------------|
| <input type="checkbox"/> | Via Legal Messenger |
| <input type="checkbox"/> | Via Facsimile |
| <input checked="" type="checkbox"/> | Via Electronic Mail |
| <input type="checkbox"/> | Via U.S. Mail/Commercial Post |
| <input checked="" type="checkbox"/> | Via Electronic Filing/Eservice |
| <input type="checkbox"/> | Via Hand-Delivery |

The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 29th day of June 2020.

SEATTLE LITIGATION GROUP, PLLC

/s/ Sean Stevens
Sean Stevens
Paralegal